

STATE OF MICHIGAN
IN THE SUPREME COURT

CARL STONE and NANCY STONE,

Plaintiffs-Appellees,

-vs-

DAVID A. WILLIAMSON M.D., JACKSON
RADIOLOGY CONSULTANTS P.C., and
W. A. FOOTE MEMORIAL HOSPITAL,
Jointly and Severally,

Defendants-Appellants.

Supreme Court No. 133986

Court of Appeals No. 265048

Jackson County Circuit Court
No. 03-001912-NH

BRIEF *AMICUS CURIAE* ON BEHALF OF
THE MICHIGAN ASSOCIATION FOR JUSTICE

CERTIFICATE OF SERVICE

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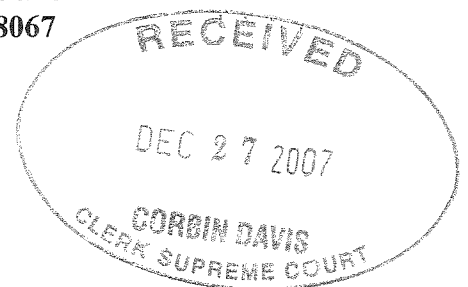


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STATEMENT OF FACTS

Amicus Curiae, the Michigan Association for Justice, hereby adopts the Counter-Statement of Material Proceedings and Facts contained in the brief which has been filed in this Court on behalf of plaintiffs-appellees, Carl Stone and Nancy Stone.

ARGUMENT

UNDER A CORRECT READING OF MCL 600.2912a(2), PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE ON THE ISSUE OF PROXIMATE CAUSE TO SUPPORT THE JURY'S VERDICT.

This case raises a significant legal question regarding the interpretation and application of MCL 600.2912a(2). Several of the briefs which have been filed in this Court contain a decidedly mathematical analysis of the appropriate interpretation of that statute. *Amicus curiae*, the Michigan Association for Justice, believes that the correct interpretation of this statute does not lie in mathematics or probabilities. Rather, the correct interpretation of MCL 600.2912a(2) is to be found in the words used by the Michigan Legislature in drafting that statute.

To understand those words, it is necessary to begin with an examination of the events which led to the Legislature's adoption of that statute.

A. The History Behind §2912a(2).

MCL 600.2912a(2) was enacted in 1993 in response to this Court's decision in *Falcon v Memorial Hospital*, 436 Mich 443; 462 NW2d 44 (1990). The testimony developed by the plaintiff in *Falcon* established that the defendants were negligent in failing to prevent an amniotic fluid embolism which resulted in the death of plaintiff's decedent, Nena Falcon. The testimony developed in *Falcon* further established that, had the defendants done what the standard of care required, Ms. Falcon would have had a 37.5% chance of surviving the embolism.

The circuit court in *Falcon* granted a directed verdict to the defendants on the ground that the proofs failed to establish that it was more likely than not that Ms. Falcon would have survived even in the absence of defendants' negligence. The Michigan Court of Appeals reversed that ruling, concluding that appropriate treatment by the defendants "had the potential for improving the patient's recovery or preventing the patient's death." *Falcon v Memorial Hospital*, 178 Mich App 17, 26-27; 443 NW2d 431 (1989).¹

In January 1990, this Court agreed to review the Court of Appeals' ruling in *Falcon*. The Court's examination of the causation issues presented in *Falcon* took place nine years after the publication in the Yale Law Journal of a highly influential article on this subject written by Professor Joseph King. King, *Causation, Valuation, And Chance In Personal Injury Torts Involving Preexisting Conditions And Future Consequences*, 90 Yale LJ 1353 (1981). In that article, Professor King argued that in a malpractice action in which the defendant's negligence takes place in conjunction with a preexisting condition, adherence to the traditional "more likely than not" standard of proximate cause leads to arbitrary results, allowing in some instances the undercompensation of the plaintiff and in other cases the overcompensation of the plaintiff. King, 90 Yale LJ at 1376-1382. In Professor King's view, application of the "more likely than not" standard represented an inappropriate "all or nothing" approach to causation, under which a person who falls below the 50% demarcation would receive no recovery and the person who could establish a 51% chance of a

¹The Court of Appeals' decision in *Falcon*, if affirmed, would have placed Michigan among a distinct minority of jurisdictions which have held that a plaintiff who establishes a less than 50% chance of an unfavorable result would be able to recover *all* of the damages associated with that result. *Cf Kallenberg v Beth Israel Hospital*, 45 App Div 2d 177; 357NYS2d 508, 510-511 (1974), *aff'd* 37 NYS2d 719; 374 NYS2d 615; 337 NE2d 128 (1975). As will be seen, this Court in *Falcon* did not accept the Court of Appeals' conclusion that the plaintiff in that case could recover all of the damages associated with Ms. Falcon's death.

favorable result would recover all of his/her injuries. *Id.* at 1376-1377; 1387. In an attempt to remedy both the overcompensation and under-compensation which he perceived under the traditional preponderance of the evidence standard, Professor King proposed that courts recognize a patient's loss of a chance for a more favorable result as itself a compensable injury. *Id.* at 1376-1387.

Based in part on Professor King's article and a number of court decisions² which had already adopted his formulation of a compensable loss of opportunity, the plaintiff in *Falcon* argued before this Court that she should be compensated for the loss of the 37.5% opportunity which Nena Falcon had to survive the embolism which caused her death. The defendants, on the other hand, argued in *Falcon* that awarding Ms. Falcon any damages in these circumstances would upset a fundamental principle of the tort system - that a plaintiff may be awarded damages only if the plaintiff proved by a preponderance of the evidence that the defendant's negligence caused injury.

The four justices who comprised the majority of this Court in *Falcon* did not view these two arguments as necessarily conflicting. The *Falcon* majority held that the plaintiff could present her claim for damages while at the same time leaving undisturbed the traditional "more likely than not" formulation of causation. The *Falcon* majority bridged the conceptual gap between the parties' arguments not by altering the law of causation, but by recognizing a completely new type of potential

²Among the numerous court decisions which adopted Professor King's views in the years before *Falcon* was decided were the following: *McKellips v St. Frances Hospital, Inc.*, 741 P2d 467 (Okla 1987); *Richmond County Hospital Authority v Dickerson*, 356 SE2d 548 (Ga 1987); *DeBurkarte v Louvar*, 393 NW2d 131 (Iowa 1986); *Waffen v United States Department of Health & Human Services*, 799 F2d 911 (4th Cir 1986); *Herskovits v Group Health Co-Op Of Puget Sound*, 99 Wash2d 609; 664 P2d 474 (1983) (J. Pearson, concurring); *Sharp v Kaiser Foundation Health Plan of Colorado*, 710 P2d 1153 (Colo App 1985); *Aasheim v Humberger*, 215 Mont 127; 695 P2d 824 (1985); *Thompson v Sun City Community Hospital, Inc.*, 141 Ariz 597; 688 P2d 605 (1984).

injury - the loss of opportunity.³

The *Falcon* majority therefore held: “We thus see the injury resulting from medical malpractice as not only, or necessarily, physical harm, but also as including the loss of opportunity of avoiding physical harm.” 437 Mich at 460. As expressed in the lead opinion in *Falcon*, the specific injury which the Court was recognizing - loss of opportunity - was to be distinguished from the physical injury which the plaintiff actually sustained:

A number of courts have recognized, as we would, loss of an opportunity for a more favorable result, as distinguished from the unfavorable result, as compensable in medical malpractice actions. Under this approach, damages are recoverable for the loss of opportunity although the opportunity lost was less than even, and thus it is not more probable than not that the unfavorable result would or could have been avoided.

Id. at 461-462 (emphasis added).

Consistent with its determination that Ms. Falcon’s loss of the opportunity to survive the amniotic fluid embolism represented a separate and distinct injury for which she could be compensated, the majority in *Falcon* held that plaintiff could not recover the full amount of the damages associated with Ms. Falcon’s actual injury, her death. Instead, what the *Falcon* majority held was that the plaintiff could recover only 37.5% of the total damages associated with Ms. Falcon’s death. *Id.* at 471.

Among the arguments which the defendants and their *amici* had raised in *Falcon* was that, if the Court were to follow the path set out in Professor King’s article and embrace loss of opportunity as an injury in and of itself, Michigan courts would be inundated with malpractice claims

³Thus, the four person majority in *Falcon* asserted that under the common law lost opportunity rule which it was adopting, the “more likely than not” causation standard was being preserved: “the plaintiff must establish more-probable-than-not causation. He must prove more probably than not, that the defendant reduced the opportunity of avoiding harm.” 436 Mich at 53.

in which the plaintiff's actual loss of opportunity was statistically insignificant. In response to this argument, the *Falcon* majority limited its holding to those situations in which the plaintiff's loss of opportunity of avoiding physical harm could be characterized as "substantial". 436 Mich at 469-470. The majority concluded that the 37.5% opportunity lost by Ms. Falcon was sufficiently substantial to be actionable and it left for future cases the determination of what lesser percentage of lost opportunity would be sufficient to support such a claim:

We are persuaded that loss of a 37.5 percent opportunity of living constitutes a loss of a substantial opportunity of avoiding physical harm. We need not now decide what lesser percentage would constitute a substantial loss of opportunity.

Id. at 470.

In *Falcon*, three members of this Court jointed a spirited dissent authored by Justice Dorothy Comstock Riley. That dissent viewed the majority's conclusion that plaintiff could recover damages for a less-than-50% chance of survival as "a fundamental redefinition of the meaning of causation in tort law." *Id.* at 481. The dissent specifically took issue with one of the principal themes of Professor King's 1981 article, that the "more likely than not" standard of causation was essentially arbitrary, resulting in both unnecessary overcompensation and undercompensation of injured parties:

It is no answer that full compensation based on less than a certainty that a patient would have survived is overcompensation. Professor King criticizes the probability standard of causation because, in his view, it treats the better-than-even chance as a certainty, "as though it had materialized or were certain to do so." *Id.*, p. 1387. Clearly, causation can never be proven to a certainty; the law settles for less in determining that a defendant should be held liable for damages to a plaintiff. Thus, Professor McCormick describes the preponderance of the evidence standard of proof in terms of "probability":

The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence. Thus the preponderance of evidence becomes the trier's belief if the preponderance

of probability. [McCormick, Evidence (3d ed), §339, p. 957.]

436 Mich at 489-490.

As the author of the *Falcon* dissent later observed in *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997), the fundamental error in the majority opinion in *Falcon* was its abrogation of the preponderance of the evidence standard:

The antithesis of proximate cause is the doctrine of lost opportunity. The lost opportunity doctrine allows a plaintiff to recover when the defendant's negligence possibly, *i.e.*, a probability of fifty percent or less, caused the plaintiff's injury.

Id. at 648

B. The Text Of §2912a(2).

The Michigan Legislature responded to the *Falcon* decision by enacting §2912a(2). That statute provides:

In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

MCL 600.2912a(2) contains two sentences with respect to the causation component of a medical malpractice case. The first sentence of §2912a(2) pertains to those situations in which a plaintiff has “suffered an injury.” In *Wickens v Oakwood Healthcare System*, 465 Mich 53; 631 NW2d 686 (2001), this Court ruled that the meaning of the first sentence of §2912a(2) is governed by the verb tense used therein. 465 Mich at 60-61. Thus, this sentence applies to any case in which the plaintiff *has previously suffered* a particular injury. In those circumstances, the plaintiff can recover for that injury only by proving that the injury “more probably than not was proximately caused by the negligence of the defendant or defendants.”

While the first sentence of §2912a(2) pertains to the requisite causal relationship between a defendant's negligence and injuries which the plaintiff has suffered, the second sentence governs two very particular types of losses which a plaintiff *might* claim in a malpractice action. The second sentence of §2912a(2) specifies that a malpractice plaintiff who chooses to sue for either the loss of an opportunity to survive or the loss of an opportunity to achieve a better result cannot succeed on such a claim "unless the opportunity was greater than 50%."

In *Weymers*, this Court in dictum expressed the view that in passing §2912a(2) "our Legislature immediately rejected *Falcon* and the lost opportunity doctrine."⁴ The *Weymers* Court's observation regarding the impact of §2912a(2) was only partially correct. There is absolutely no question that with the passage of §2912a(2) the Michigan Legislature completely reinforced the "more likely than not" causation standard which was the centerpiece of Justice Riley's dissent in *Falcon*. Both the first sentence of §2912a(2) addressing injuries which the plaintiff has suffered and the second sentence of that statute addressed to any action seeking to recover for the loss of an opportunity to survive or the loss of an opportunity to achieve a better result call for proofs by a preponderance of the evidence. Thus, it cannot be contested that the 37.5% chance of survival which the majority of this Court found to be compensable in *Falcon* was eliminated by §2912a(2). For a loss of opportunity to survive to be compensable under the second sentence of §2912a(2), there must

⁴The *Weymers* Court acknowledged that §2912a(2) applied only to causes of action which arose after October 1, 1993. 454 Mich at 649. Since *Weymers* involved a cause of action which arose in October 1990, it is clear that any observation made by the Court in that case with respect to the effects of §2912a(2) was of no consequence to the decision rendered in that case. See *People v Williams*, 475 Mich 245, 251, n. 1; 716 NW2d 208 (2006) (defining obiter dictum as "[a] judicial comment made during the course of an opinion, but one that is unnecessary to the decision in the case and therefore not precedential."); *Roberts v Auto-Owners Ins. Co.*, 422 Mich 594, 597-598; 374 NW2d 905 (1985).

be proof that this opportunity was “greater than 50%.”

Yet, while the second sentence of §2912a(2) clearly overruled this aspect of the *Falcon* decision, there is one element of that case which was confirmed by the Legislature’s passage of that statute. As noted previously, one of the essential components of the *Falcon* majority opinion was the establishment of a new type of injury cognizable in malpractice actions. The *Falcon* majority recognized the plaintiff’s loss of an opportunity to avoid physical harm as an injury separate and distinct from the actual injury which the plaintiff sustained. 436 Mich at 461.

Far from abrogating the *Falcon* Court’s recognition of a new form of damage premised on loss of opportunity, §2912a(2) embraced that concept. The second sentence of that provision specifically anticipates that there will be medical malpractice actions in which the plaintiff seeks to recover for the loss of an opportunity to survive or the loss of an opportunity to achieve a better result. Thus, §2912a(2) constitutes statutory recognition of one of the components of the *Falcon* decision - the existence of a potential cause of action based on loss of an opportunity.

C. The Court Of Appeals’ Decision In *Fulton v William Beaumont Hospital*, 253 Mich App 70; 655 NW2d 569 (2002), And Why That Decision Was Wrong.

In its September 27, 2007 Order, this Court granted leave to appeal limited to four issues. Among these issues was the question of whether *Fulton v William Beaumont Hospital*, 253 Mich App 70; 655 NW2d 569 (2002), was correctly decided. For the last five years, the Court of Appeals’ decision in *Fulton* has had an inordinate impact on the proximate cause element in many medical malpractice cases. The elimination of the *Fulton* panel’s completely invalid interpretation of §2912a(2) is long overdue. This Court must reject the Court of Appeals’ determination in that case.

The facts in the *Fulton* case were relatively straightforward. Julie Fulton saw an

obstetrician/gynecologist in February 1995, who discovered some abnormalities in her cervix. No definitive tests were performed at that time to determine the cause of these abnormalities. Ten months later, following the birth of her child, Mrs. Fulton was diagnosed with stage IIB cervical cancer. In June 1997, Mrs. Fulton and her husband filed a medical malpractice action in which they alleged that the defendants' failure to diagnose cervical cancer in February 1995 resulted in the loss of her opportunity to survive.⁵ 253 Mich App at 73.

The testimony developed during the discovery stage of *Fulton* established that, if proper diagnosis of cervical cancer had been made in February 1995 at the time of the malpractice alleged, Mrs. Fulton with appropriate treatment would have had an 85% chance of surviving the cancer. Plaintiff's expert further testified that, at the time that the correct diagnosis was made in December 1995, a patient with stage IIB cervical cancer would have had a 60-65% chance of survival.

The *Fulton* panel summarized the issue which it was being asked to consider as follows:

The issue before this Court is whether the second sentence of the statute requires a plaintiff in order to recover for loss of an opportunity to survive to show only that the initial opportunity to survive before the alleged malpractice was greater than fifty percent, as argued by plaintiff, or, instead, that the opportunity to survive was reduced by greater than fifty percent because of the alleged malpractice, as argued by defendants.

253 Mich App at 78.

As this statement of the issue attests, the entire focus of the *Fulton* opinion was on the second

⁵Mrs. Fulton died some time after the complaint was filed. The *Fulton* opinion noted that following her death, an amended complaint was filed. 253 Mich App at 73. However, the opinion in *Fulton* does not reflect whether the complaint was amended to allege that the defendants' negligence caused Mrs. Fulton's death. Thus, according to the Court of Appeals' decision in *Fulton*, it appears that the only claim that plaintiff proceeded on in that case was a claim for the loss of opportunity to survive. 253 Mich App at 73.

sentence of §2912a(2).⁶

The majority opinion in *Fulton* began its analysis of §2912a(2)'s second sentence by concluding that there existed an ambiguity with respect to its requirement that *the opportunity* must be greater than 50%:

In examining the second sentence of MCL 600.2912a(2), it is not clear to what the Legislature was referring when it stated that “the opportunity” must be greater than fifty percent. “[T]he opportunity” could either refer to the plaintiff’s initial opportunity to survive or achieve a better result before the alleged malpractice or could refer to the plaintiff’s loss of opportunity to survive or achieve a better result.

253 Mich App at 79-80.

Thus, the *Fulton* majority opinion opined that the “opportunity” which had to be “greater than 50%” under §2912a(2), might refer to the initial opportunity which the plaintiff possessed at the time of the alleged malpractice was committed or it might refer to a 50% *loss* of such an opportunity. *Id.*

Ultimately, the *Fulton* majority was to opt for the latter of the two interpretations of §2912a(2). In arriving at that result, the *Fulton* panel turned first to the history behind the Legislature’s adoption of §2912a(2). The *Fulton* panel reviewed this Court’s decision in *Falcon*, noting particularly the *Falcon* majority opinion’s assessment that Mrs. Falcon’s loss of a 37.5% chance of survival “constituted a loss of a substantial opportunity of avoiding harm.” 253 Mich App at 81. The 37.5% opportunity which Ms. Falcon lost was deemed “substantial” enough by the *Falcon* majority to allow plaintiff to assert a claim for damages for the loss of the opportunity to

⁶As will be explained in the next section of this brief, *Fulton*’s exclusive focus on the second sentence of §2912a(2) is of critical importance here since the instant case is *not* controlled by the second sentence of that statute. Here, plaintiffs’ cause of action sought recovery for the injuries which Mr. Stone had already suffered - the numerous medical complications which ensued as a result of the aneurysm which ruptured in April 2002. Unlike *Fulton*, the plaintiffs herein have not alleged claims of loss of opportunity to survive or the loss of opportunity for a better result which would be governed by §2912a(2)’s second sentence.

avoid an injury.

After reviewing *Falcon* and the Michigan Legislature's response to that decision in §2912a(2), the *Fulton* majority came to this rather remarkable conclusion:

Considering the Legislature's immediate action in response to *Falcon*, it is reasonable to conclude that MCL 600.2912a(2) was enacted to codify and increase the requirements for what constitutes a "substantial loss of opportunity."

* * *

The rational interpretation is that the Legislature amended the statute as a rejection of the *Falcon* Court's holding that a 37.5 percent loss of an opportunity was substantial, and therefore actionable.

253 Mich App at 82.

Based largely on its determination that the Legislature was responding to the *Falcon* Court's determination that its 37.5% loss of opportunity was "substantial", the *Fulton* majority ruled that, to make out a claim for the injuries identified in the second sentence of §2912a(2), the plaintiff must establish a loss of fifty percentage points. According to the *Fulton* panel, this 50% difference is to be measured at two points in time, when the defendant commits malpractice and when the correct determination of the plaintiff's condition is actually made. According to the *Fulton* Court, this result was dictated by the fact that a "rational interpretation" of what the Legislature did in enacting §2912a(2) was to reject "the *Falcon* Court's holding that a 37.5% loss of opportunity was substantial." 253 Mich App at 82. This is a completely erroneous reading of the impact of §2912a(2).

In enacting §2912a(2), the Michigan Legislature was in no way responding to the *Falcon* Court's conclusion that a 37.5% loss of opportunity to survive was sufficiently "substantial." What the Legislature was responding to when it drafted §2912a(2) was the critique of the *Falcon* majority

opinion contained in Justice Riley's vigorous dissent in that case - *that the 37.5% chance that Ms. Falcon had to survive was not in excess of 50% and, therefore, the majority opinion in Falcon had undermined the traditional "more likely than not" standard of causation.*

The Michigan Legislature's adoption of §2912a(2) has nothing whatsoever to do with whether a plaintiff's loss of opportunity is or is not "substantial." But, that statute has everything to do with restoring the traditional preponderance of the evidence standard which, according to the dissenters in *Falcon*, was undone by the majority opinion in that case and its adoption of the loss of opportunity doctrine - a concept which the *Falcon* dissenters viewed "the antithesis of proximate cause." *Weymers*, 454 Mich at 648.

The forgoing analysis of the Court of Appeals' decision in *Fulton* exposes an extraordinary irony in the conclusion reached by the panel in that case. MCL 600.2912a(2) is unquestionably a legislative response to this Court's decision in *Falcon*. In *Falcon*, it was the plaintiff who advocated the position that there was nothing "magical" about the "more likely than not" standard of causation in personal injury cases. Thus, it was the plaintiff in *Falcon* who advocated a view of the law that the plaintiff could be compensated for an injury which was only 37.5% likely to have resulted from the negligence of the defendant.

A majority of this Court agreed with the plaintiff's arguments in *Falcon*. The majority opinion downplayed the importance of the "more likely than not" test of causation, observing that this standard "as well as other standards of causation, are analytic devices - tools to be used in making causation judgments. They do not and cannot yield ultimate truth." 436 Mich at 451. Three members of this Court vigorously dissented from that ruling. In that dissent they argued that the majority had eviscerated a fundamental of all tort litigation - proof of injury by a preponderance of

the evidence.

It was the dissenting opinion's view of the law with respect to the "more likely than not" standard which was vindicated when the Michigan Legislature responded to *Falcon* by passing §2912a(2). It is, therefore, impossible to come away from a reading of §2912a(2) without reaching the conclusion that this statute was designed to enshrine in Michigan malpractice law the basic point advanced by the dissent in *Falcon* - that all such cases must be controlled by the "more likely than not" standard of causation. Yet, what is so remarkable about the conclusion ultimately reached by the panel in *Fulton* is that *this decision compels the conclusion that in certain cases a plaintiff who proves the loss of an opportunity to survive or the loss of an opportunity to achieve a better result by a preponderance of the evidence will be unsuccessful.*

Consider a case in which at the time the defendant commits malpractice, the plaintiff would have had a 70% chance of avoiding a particular harm. Months later, when a correct diagnosis is made it is determined that the plaintiff has a 30% opportunity of avoiding that harm. In these circumstances, the plaintiff has unquestionably proved that the defendant's negligence has "more likely than not," caused the loss of her opportunity to achieve a better result. Yet, under the subtraction principle adopted by the *Fulton* panel, the difference between these two probabilities (70% - 30%) does not exceed 50%, and as a result, under the logic of the *Fulton* decision, this hypothetical would not give rise to any recovery.

In *Falcon*, a majority of this Court adopted the plaintiff's and Professor King's contentions that the preponderance of the evidence standard when applied in these circumstances rendered arbitrary results, overcompensating some plaintiffs while under-compensating others. The dissent in *Falcon*, citing the sanctity of the "more likely than not" view of causation, rejected this argument:

It is no answer that full compensation based on less than a certainty that a patient would have survived is overcompensation. Professor King criticizes the probability standard of causation because, in his view, it treats the better-than-even chance as a certainty, “as though it had materialized or were certain to do so.” *Id.*, p. 1387. Clearly causation can never be proved to a certainty; *the law settles for less in determining that a defendant should be held liable for damages to a plaintiff.*

436 Mich at 489-490 (emphasis added).

It was the view of the law as expressed in the *Falcon* dissent which was adopted by the Michigan Legislature when it enacted §2912a(2) and provided that proof of the loss of an opportunity had to be “greater than 50%.” But, what the Court of Appeals so clearly overlooked in rendering its decision in *Fulton* is that, by reestablishing the greater than 50% barrier associated with the “more likely than not” standard, the Michigan Legislature was also reestablishing the “arbitrary” results which had been identified in Professor King’s article. Thus, in enacting §2912a(2) the Michigan Legislature approved the “overcompensation” identified in the *Falcon* dissent for those plaintiffs who prove a 51% loss of an opportunity to survive or the loss of an opportunity for a better result.⁷

On this basis alone, the Court must reject the conclusion reached by the Court of Appeals in *Fulton*. That case somehow took a statute whose whole purpose was to reestablish the validity of the “more likely than not” standard of causation and it managed to reach an opinion under which a plaintiff who establishes the loss of an opportunity to survive or the loss of an opportunity to achieve

⁷Phrased somewhat differently, what the plaintiff argued in *Falcon* was that there was nothing necessarily “magical” about the 50% demarcation embodied in the “more likely than not” standard of causation. The dissent in *Falcon* obviously disagreed as did the Legislature in passing §2912a(2). This Court must therefore come to the conclusion that, with the adoption of §2912a(2), there *is* something “magical” about the “more likely than not” standard. Since the *Fulton* Court’s decision removes the “magic” associated with the 50% demarcation in some cases, that decision must be rejected.

a better result by a preponderance of the evidence will lose because of a failure in his causation proofs. This is an inconceivable result, but it is a result which directly follows from the *Fulton* majority opinion.

The error in the *Fulton* opinion is not confined to its repudiation of the preponderance of the evidence standard. From a purely textual standpoint, the result reached in *Fulton* cannot withstand analysis. The second sentence of §2912a(2) applies to an action in which the plaintiff seeks to recover for “loss of an opportunity to survive or an opportunity to achieve a better result.” Under the final clause of that statute, neither of these losses will be the basis for recovery “unless the opportunity was greater than 50%.” (emphasis added).

The second sentence of §2912a(2) uses the word “opportunity” three times. The first two times, the language of the statute refers to “loss of an opportunity.” However, the third time the word “opportunity” is used, in the critical final phrase of that statute, the word that the Legislature chose to use was “opportunity” alone, not “loss of opportunity.”

The use of the word “opportunity” in the final phrase of §2912a(2) is of critical importance here. As even the *Fulton* majority conceded, the conclusion which it reached in that case would be textually proper if the word “loss” were substituted for the word “opportunity” in the final clause of the statute.⁸ But, in drafting §2912a(2) the Michigan Legislature did not specify that a claim for lost opportunity was unavailable “unless the *loss* was greater than 50%”. Nor did the Legislature provide that an action for lost opportunity could not succeed “unless the *loss of opportunity* was greater than 50%. What the Legislature provided instead was that such a theory could not proceed “unless the

⁸The panel in *Fulton* acknowledged that “for the language of the statute to plainly indicate that the [*Fulton* Court’s] interpretation of the statute was intended, the words “loss of” must be inferred to modify “opportunity” in the final clause of §2912a(2). 253 Mich App at 80.

opportunity was greater than 50%.”

Statutes are to be enforced as written. A court “may not assume that the Legislature inadvertently made use of one word or phrase instead of another.” *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000); *Detroit v Redford Township*, 253 Mich 453, 456; 235 NW2d 217 (1931). This Court may not assume that the Legislature inadvertently used only the word “opportunity” in the final phrase of §2912a(2), and that it really meant to say that plaintiff could not recover for a loss of opportunity “unless the loss of opportunity was greater than 50%” or “unless the loss was greater than 50%.”

This Court has also recognized repeatedly that “[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.” *Woodard v Custer*, 476 Mich 545, 563, n. 7; 719 NW2d 842 (2006) *citing Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993). The admonition contained in *Woodard* and *Farrington*, which pertains to a comparison of two different statutes, should have even greater force when considering the language contained in a single statute.

In *Fulton*, the Court of Appeals improperly assumed that, after the Legislature used the term “loss of opportunity” in the second sentence of §2912a(2), it inadvertently omitted that same phrase in the last clause of that provision. The Court of Appeals in *Fulton*, therefore, did precisely what *Woodard* and *Farrington* prohibit; it interpreted the final clause of §2912a(2) on the basis of language which simply is not there.

There is one other serious textual error in the *Fulton* opinion. The end result of the holding in that case is that the plaintiff must prove a greater than 50 percentage *point* difference to succeed

on any claim seeking recovery for loss of opportunity. The Court in *Fulton* ruled that, because the difference between plaintiff's opportunity of avoiding injury at the time of malpractice (85%) less the percentage of avoiding injury at the time the diagnosis of cervical cancer was confirmed (60%-65%) was less than 50 percentage points, the plaintiff's claims had to be dismissed.

The obvious difficulty presented by the *Fulton* Court's subtraction of opportunities is that there is nothing in §2912a(2) which speaks to percentage *points*.⁹ Thus, the *Fulton* Court has not only rewritten the final clause of §2912a(2) to substitute the word "loss" for the word in that statute, "opportunity", but it has also added one additional word at the end of that sentence. Thus, as rewritten by the *Fulton* Court, the second sentence of §2912a(2) now provides: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an

⁹In an apparent attempt to bolster the result reached in *Fulton*, the defendants and their *amicus curiae* make reference to MCivJI 30.20, the Model Jury Instruction designed to incorporate the *Fulton* holding. See Defendants' Brief, p. 23. That instruction bears examination since it provides (consistent with *Fulton*) that a plaintiff cannot recover for the loss of opportunity to survive unless she proves that the decedent's chance of survival "fell more than 50 percentage points as a result of professional negligence." The Committee responsible for drafting this model instruction is charged with the responsibility of reflecting governing Michigan law, which at present includes the Court of Appeals' erroneous interpretation of §2912a(2) in *Fulton*. The Model Jury Instruction Committee has performed its function by drafting an instruction which is fully consistent with the *Fulton* decision. However, the Court would do well to place MCivJI 30.20, which faithfully reproduces the holding in *Fulton*, side-by-side with the actual text of the second sentence of §2912a(2). That comparison should instantly reveal how far afield the holding in *Fulton* is from the actual language chosen by the Michigan Legislature in §2912a(2).

There is, however, one extremely important thing about MCivJI 30.20 which defendants omit. The Note On Use accompanying that instruction specifies that this instruction is to be used "only if there is a claim involving a loss of opportunity to survive or achieve a better result." Thus, the Model Jury Instruction Committee has explicitly recognized that this instruction is not to be used where the plaintiff is suing for an injury other than lost opportunity. This limitation is of significance here since, as will be discussed in the next section of this brief, Mr. and Mrs. Stone were not suing for lost opportunity.

opportunity to achieve a better result unless the loss was greater than 50 percentage points.” The Michigan Legislature certainly *could have* written such statute. But, that is not the statute that the Michigan Legislature wrote in 1993 when it enacted §2912a(2).

For all of these reasons, the Court must reject the result reached by the Court of Appeals in *Fulton*. Yet, even if this Court were to leave the Court of Appeals’ decision in *Fulton* undisturbed, that decision addressing only the causation proofs necessary where the plaintiff sues to recover the loss of an opportunity to survive or the loss of an opportunity of a better result has absolutely no impact on this particular case. It is that issue which will be addressed in the final section of this brief.

D. Application Of §2912a(2) To The Facts Of This Case.

As indicated in the Court’s September 26, 2007 order, the first issue on which the Court has granted leave to appeal is the following question: “whether the requirements set forth in the second sentence of MCL 600.2912a(2) apply to this case.” This first issue is dispositive of the dispute between the parties. The second sentence of §2912a(2), the portion of the statute on which the defendants predicate their entire argument, does not apply to this case.

The evidence in this case established that because of the defendants’ negligence, an aneurysm in Mr. Stone’s abdomen that should have been detected and surgically addressed in January 2000 was not timely treated. As a result of the defendants’ negligence, that untreated aneurysm increased in size and ultimately ruptured in April 2002. Because the aneurysm ruptured, Mr. Stone sustained severe medical complications including kidney failure, multi-organ failure, shocked liver, cardiac infarction and gangrene, which ultimately required the amputation of both of his legs.

Thus, when Mr. and Mrs. Stone filed this case in 2003, Mr. Stone had suffered severe injuries

attributable to the defendants' January 2000 negligence. In their Complaint, plaintiffs sought to recover for those injuries. This case was filed to recover damages for the injuries which Mr. Stone sustained. The causation element of plaintiffs' case was, therefore, controlled by the first sentence of §2912a(2), the section of that statute which governs the causation burden applicable to a medical malpractice plaintiff who has "*suffered an injury*."

As discussed previously in this brief, the decision rendered by this Court in *Falcon* drew a distinction between those situations in which a plaintiff sues based on an actual physical injury and those cases in which a plaintiff sues for the loss of an opportunity to avoid an injury. The majority opinion in *Falcon* recognized "loss of an opportunity for a more favorable result, as distinguished from the unfavorable result, as compensable in medical malpractice actions." 436 Mich at 461.

The distinction between the two types of injuries identified in *Falcon* - the actual injury sustained by the plaintiff and the plaintiff's loss of the opportunity to avoid that injury - has been preserved in §2912a(2). The first sentence of that statute applies to those cases in which the plaintiff sues for damages based on the fact that he has "*suffered an injury*." The second sentence of §2912a(2) applies to those cases in which the plaintiff sues for two particular types of injury, the loss of the opportunity to survive or the loss of the opportunity to achieve a better result.

There can be no serious debate as to the type of action brought by the plaintiffs here. They were suing for the severe injuries which Mr. Stone had already sustained as a consequence of the ruptured aneurysm. Plaintiffs were not suing for the loss of an opportunity to achieve a better result; such a claim was not alleged by the plaintiffs and such a claim was never litigated by the plaintiffs.

This case is controlled by the first sentence of §2912a(2). Under that provision, the plaintiffs met their burden on the issue of proximate cause by presenting evidence that Mr. Stone "*suffered*

an injury that more probably than not was proximately caused by the negligence of the . . . defendants.” The defendants do not contest the fact that, under the proximate cause burden imposed in the first sentence of §2912a(2), this case was properly submitted to the jury.

Since the Court of Appeals September 2002 decision in *Fulton* misconstruing the second sentence of §2912a(2), medical malpractice defendants have attempted to convince Michigan courts that *every* action grounded in malpractice is somehow controlled by *Fulton* and the second sentence of §2912a(2). Medical malpractice defendants have for the last five years asked the courts of this state to ignore the clear import of the first sentence of that statute, which is supposed to apply to all cases in which the plaintiff sues to recover for a specific injury, and to place every single case into the second sentence of §2912a(2), to be governed by the framework developed by the Court of Appeals in *Fulton*.

The defendants in this case are no exception. Recognizing that they have no viable causation argument with respect to the first sentence of §2912a(2), the defendants argue that this Court should ignore the fact that the plaintiffs are suing for the particular physical injuries which Mr. Stone sustained as a result of the ruptured aneurysm and to transform this case into one in which plaintiffs seek to recover only for loss of an opportunity. The defendants contend that every single malpractice case in which the plaintiff sues based on a delay in diagnosis or treatment is “quintessentially” a lost opportunity case. Defendants’ Brief, p. 15. The defendants thus ask this Court to embrace a distinction between delay in diagnosis/delay in treatment cases which, in their view, are all to be lumped into the category of lost opportunity cases, and those cases involving “direct” injury which, according to defendants, represent those cases “in which the health care provider causes the injury

for which damages are sought.” Defendants’ Brief, p. 15.¹⁰

The defendants’ attempt to shoehorn this case, in which plaintiffs have neither alleged nor litigated the loss of an opportunity, into the second sentence of §2912a(2) is mystifying. The distinction which the defendants would have this Court draw between “direct” physical injury and physical injury resulting from a delay in diagnosis exists nowhere in Michigan law. Most importantly, the distinction which defendants ask this Court to adopt does not exist in the statute under consideration in this case, §2912a(2). The first sentence of that statute provides the proximate cause element of *any* medical malpractice claim in which the plaintiff “suffered an injury.” That sentence of §2912a(2) does not distinguish between injuries that result from a physician’s failure to diagnose a condition or a “direct” injury caused by a physician’s negligence.¹¹

Here, the injuries which Mr. Stone is claiming are the various forms of physical harm which resulted from the untreated abdominal aneurysm which ruptured in April 2002. Thus, plaintiffs herein were *not* seeking recovery for the loss of the opportunity to realize a better result, they were seeking recovery for the severe medical complications which flowed from the defendants’

¹⁰The defendants’ formulation of what constitutes a “direct” injury is somewhat difficult to follow. The defendants assert that such an injury exists when “the health care provider causes the injury for which damages are sought.” Defendants’ Brief, 15. In light of the jury verdict rendered in plaintiffs’ favor in this case, it can be said with assurance that in this action which is predicated on a delay in the treatment of Mr. Stone’s aneurysm, the defendants’ professional negligence did, in fact, “cause[] the injury for which damages are sought.”

¹¹The Court should also be conscious of the fact that application of the distinction which defendants ask this Court to adopt would be fraught with difficulty. The distinction which defendants advocate between failure to diagnose and “direct” injury looks suspiciously like the nonfeasance/misfeasance distinction which has on occasion surfaced in other areas of tort law. This Court has expressed its dissatisfaction with this distinction, describing it as “slippery” and “often largely semantic and somewhat artificial.” *Fultz v Union-Commerce Associates*, 470 Mich 460, 466-467; 683 NW2d 587 (2004). The same could probably be said of the distinction which defendants ask this Court to create here.

negligence, including the amputation of both of Mr. Stone's legs. These injuries, regardless of the form of the malpractice which caused them, are governed by the first sentence of §2912a(2).

Quite apart from the fact that there is no legal support for the defendants' attempt to shoehorn this case in which the plaintiff is suing for discernable physical injuries which he has sustained into the second sentence of §2912a(2), there is another practical reason why the defendants' request to apply the second sentence of §2912a(2) and *Fulton* to this or any other case in which the plaintiff has sustained a particular injury must be categorically rejected.

The defendants ask this Court to apply *Fulton* to these facts. Under that case, the defendants ask the Court to examine the *statistical probabilities* of physical injury being caused to Mr. Stone at two points in time, as of January 2000 when the malpractice at issue here was committed and as of April 2002 when his aneurysm ruptured. Thus, the defendants ask the Court to compare statistical evidence of potential injury to Mr. Stone at these two points and on the basis of that statistical comparison, determine whether Mr. Stone has satisfied the proximate cause standard of §2912a(2). But in this case or any other case in which the plaintiff is suing for a particular injury which he has already sustained, the second prong of the *Fulton* statistical analysis - in this case, the statistical likelihood of an injury being caused to Mr. Stone as of date the aneurysm ruptured in April 2002 - is absolutely pointless.

Statistical probability is a necessary component of the proofs in certain medical malpractice actions precisely because these probabilities provide the most insight into what is otherwise an unknown fact. It cannot be stated with assurance whether Mr. Stone would have suffered the severe injuries that he has if the defendants had correctly diagnosed and responded to his aneurysm in January 2000. The reason, of course, why it cannot be stated with assurance what Mr. Stone's

condition would be today if his aneurysm had been treated at that time is because the defendants did not comply with the standard of care by properly diagnosing and responding to Mr. Stone's condition in January 2000. Thus, statistical examination of Mr. Stone's medical prospects *as of the time of the defendants' malpractice* is essential to this case because there can be no other evidence as to what would have happened to Mr. Stone if the defendants had complied with the standard of care and properly treated the aneurysm.

The essence of the defendants' argument premised on *Fulton* is that a court should apply the same assessment of the statistical probability of Mr. Stone avoiding severe injury as of April 2002 when the aneurysm ruptured. Thus, the defendants contend that the Court should focus its attention on the statistical probabilities of Mr. Stone avoiding medical complications, including the amputation of his legs, as of April 2002.

What the defendants so obviously ignore in making this argument is that, while a statistical analysis of Mr. Stone's prospects of avoiding physical injuries due to the aneurysm represented an essential component of his theory of causation, a purely statistical analysis of the likelihood of a person in Mr. Stone's position avoiding physical harm as of April 2002 when emergency surgery was performed, is completely irrelevant. The reason why reference to a statistical analysis of the *potential* injuries which Mr. Stone might have suffered as of April 2002 is inappropriate is *because there is no need to rely on statistics to tell us whether a person in Mr. Stone's position would have sustained such injuries*. These statistics are meaningless here because we know, as a matter of fact, that despite receiving exemplary medical care in April 2002, *Mr. Stone suffered the severe injuries which are the subject of this case*.

One does not need recourse to general medical statistics to determine whether Mr. Stone

would come through the April 2002 emergency surgery with or without severe injuries. Resort to these statistics is completely unnecessary because *we know what happened to Mr. Stone*. We know that, following the April 2002 surgery, Mr. Stone suffered severe injuries resulting from the ruptured aneurysm, including the amputation of both legs. Thus, the statistical probability of Mr. Stone avoiding the injuries which he was claiming in this case including amputation had he received appropriate medical care as of April 2002 is readily discernable - it was zero percent.

The relatively simple fact to be drawn from this analysis is that statistics pertaining to the likelihood of a particular outcome are pertinent *only when there is uncertainty with respect to that outcome*. But where a particular outcome is already established, *i.e.* where these events have already unfolded and the extent of the plaintiff's injury is manifest, resort to statistics related to potential outcomes is completely meaningless.

The error in the defendants' fixation on the statistical evidence of whether Mr. Stone could be successfully treated as of April 2002 can be demonstrated in the following hypothetical. Assume that a traffic accident occurs resulting from a head-on collision between two cars each going twenty miles per hour. Assume also that the driver of one of these vehicles has to be taken from the scene to a hospital where she is found to have suffered a broken leg. That injured driver later sues the driver of the other vehicle for the broken leg she suffered in the accident. During the course of that litigation, the defendant uncovers statistical evidence which establish that only 40% of drivers involved in head-on collisions where each car is traveling twenty miles per hour suffer broken legs.

Could the defendant in this hypothetical, citing the statistical evidence which he has discovered, assert that the plaintiff cannot recover for any damages associated with her broken leg because, statistically speaking, less than 50% of the people involved in just such an accident suffer

broken legs? The obvious answer to this silly question is that the defendant's statistic-based defense would be rejected out of hand. The defendant's statistical evidence, regardless of its overall accuracy, could not in any way change the fact that the plaintiff in this hypothetical did, in fact, suffer a broken leg in the accident.

Precisely the same thing is true with respect to the statistical "evidence" relied on by defendants here pertaining to the possible outcomes of the April 2002 emergency aneurysm surgery. All of the defendants' statistics as to the percentage of individuals who survive emergency aneurysm surgery without significant medical complications including the amputation of their legs are completely meaningless where, as here, *there is no dispute that Mr. Stone sustained these severe injuries, including the amputation of both legs, as result of the ruptured aneurysm.* In the face of the uncontroverted evidence as to the injuries which Mr. Stone sustained, the defendants' statistical evidence of potential outcomes is completely meaningless.

As noted previously, the Court of Appeals in *Fulton* was addressing a case in which the plaintiff was suing only for the loss of an opportunity to survive, not for the actual injuries which the plaintiff sustained. In that circumstance, a statistical analysis of what *might* have happened to the plaintiff as of the time that a correct diagnosis was made may be necessary. But where, as here, the plaintiff is suing for a particular injury which has already occurred, application of the *Fulton* analysis makes no sense whatsoever.

At the time plaintiffs brought this case, Mr. Stone had already sustained significant physical injuries and it was these injuries, not the value of a loss of opportunity, which he was suing for. Under these circumstances, it is the first sentence of §2912a(2) which governs here, not the second sentence of that statute as the defendants contend.

RELIEF REQUESTED

Based on the foregoing, *amicus curiae*, the Michigan Association for Justice, respectfully requests that this Court affirm the Court of Appeals' determination that plaintiffs presented sufficient evidence on the issue of proximate cause to support the verdict rendered in this case.

Respectfully submitted,

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